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 6 Juan Diaz, Keith Keesling,
 Christopher Murphy, Gary
 Weekley, Karen Allen and other
 7 employees similarly situated

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 RICHARD W. WIEKIN
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 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE

E-FILING

8 UNITED STATES DISTRICT COURT
 9 NORTHERN DISTRICT OF CALIFORNIA

10
 11 JUAN DIAZ, KEITH KEESLING,
 CHRISTOPHER MURPHY, GARY
 WEEKLEY, KAREN ALLEN and other
 12 employees similarly situated,

13 Plaintiffs,

14 vs.

15 CITY OF SAN JOSE,

16 Defendant.

607 06424 JW
 Case No.
 COMPLAINT FOR DECLARATORY
 JUDGMENT, COMPENSATION UNDER
 THE FAIR LABOR STANDARDS ACT
 AND OTHER RELIEF
 PVT

17 /
 18 NATURE OF COMPLAINT

19 1. Plaintiffs are, or at all times material were, employees of the Defendant CITY
 20 OF SAN JOSE ("City"), California, and they bring this action on behalf of themselves and
 21 those similarly situated. This is an action for declaratory judgment under 28 U.S.C. sections
 22 2201 and 2202 and for compensation and other further relief under the Fair Labor
 23 Standards Act, as amended, 29 U.S.C. sections 201, et seq.

24 JURISDICTION AND VENUE

25 2. Jurisdiction of this action is conferred on this court by 28 U.S.C. section 1331
 26 because the action arises under the FLSA, a federal law, and because such suit is
 27 authorized by 29 U.S.C. section 216(b). Venue lies within this district pursuant to 28 U.S.C.
 28

1 section 1391 and Local Rule 3-2(d) because the events giving rise to the action took place
2 in Santa Clara County.

3 **INTRADISTRICT ASSIGNMENT**

4 3. The basis for assignment to the San Jose Division, pursuant to Civil Local
5 Rule 3-2(d), is that this action arises in the County of Santa Clara.

6 **PARTIES**

7 4. Plaintiffs are, or at all times material were, employees of the City of San Jose.
8 Each of the plaintiffs has given their written consent to be a party in this action pursuant to
9 29 U.S.C. section 216(b).

10 5. Defendant City is a political subdivision of the State of California, a public
11 agency within the meaning of 29 U.S.C. section 203(d).

12 **CLAIMS FOR RELIEF**

13 6. At all times material, the Plaintiffs have been entitled to the rights, protections
14 and benefits provided under the Fair Labor Standards Act (FLSA), as amended, 29 U.S.C.
15 sections 201, *et seq.*

16 7. At all times material, the Plaintiffs have worked hours in excess of the hourly
17 levels specified in the FLSA, 29 U.S.C. section 207. As a result, at all times material,
18 Plaintiffs have been entitled to overtime compensation at a rate not less than one and one-
19 half times their regular rate of pay for the hours of overtime worked.

20 8. Plaintiffs are, or at all times material were, firefighters and employees
21 engaged in fire protection for the City. Under the FLSA and the Department of Labor's
22 regulations applicable to firefighter employees, the employer may establish and declare a
23 work period of not less than seven days nor more than 28 days. (29 U.S.C. section 207; 29
24 C.F.R. section 553.201.) The City has established and declared a work period of 14 days
25 for administrative employees and 28 days for employees who perform suppression (shift)
26 work. Employees with equal rank and years of service are paid the same base monthly
27 salary regardless of whether assigned to 14-day work periods or 28-day work periods.
28 However, the hourly rate of pay differs, with employees assigned to 14-day work periods

1 being paid a 40-hour (per week) rate of pay while employees assigned to shift work are
2 paid a lower 56 hour (per week) rate of pay.

3 9. Plaintiffs served, during all or part of the time covered by this petition, as
4 administrative employees assigned to 14-day work periods. Pursuant to the Department of
5 Labor's regulations, the Defendant must pay Plaintiffs overtime compensation at a rate not
6 less than one and one-half times their regular rate of pay (hereinafter "FLSA rate") for
7 hours worked in excess of 106 hours per 14-day work period. (29 C.F.R. §
8 553.230) Overtime hours which do not result in more than 106 total hours of work in a 14-
9 day period may be paid at one and one-half times a lower hourly rate (hereinafter "non-
10 FLSA rate").

11 10. Since before September 1, 2003, the City has violated, and is continuing to
12 violate, 29 U.S.C. section 207 and the regulations of the U.S. Department of Labor by
13 failing and refusing to pay FLSA overtime compensation to Plaintiffs at a rate not less than
14 one and one-half times the FLSA rate for hours worked in excess of the hourly and work
15 period standards applicable to firefighter employees under 29 U.S.C. section 207(k).

16 11. Plaintiffs are, and at all times applicable were, receiving a percentage of their
17 base salary as holiday "in lieu of pay." This "in lieu of pay" is received regularly each pay
18 period as part of each Plaintiff's salary. As such, pursuant to the FLSA regulations
19 promulgated by the U.S. Department of Labor, this "in lieu of pay" must be included when
20 calculating the FLSA rate for purposes of determining the overtime premium required by
21 the FLSA. (29 C.F.R. § 778.108.) Despite these regulations, the City has refused, and
22 continues to refuse, to include the "in lieu of pay" in the rate of pay that it uses to calculate
23 pay for FLSA eligible hours. As a result, the overtime rate of pay that the City has paid, and
24 continues to pay, is less than that to which the Plaintiffs are entitled to by the FLSA.

25 12. Plaintiffs are, and at all times applicable were, paid certain premium pays if
26 they meet certain eligibility requirements in regard to training and skills. These premium
27 pays include, but may not be limited to, Emergency Medical Technician pay, bilingual pay,
28 education incentive pay and administrative assignment pay. These premium pays are paid

1 as a percentage of the base salary or as a set dollar amount and are received regularly
2 each pay period as part of each eligible Plaintiff's salary. As such, pursuant to the FLSA
3 regulations promulgated by the U.S. Department of Labor, these premiums pays must be
4 included when calculating the FLSA rate for purposes of determining the overtime premium
5 required by the FLSA. (29 C.F.R. § 778.108.) Despite these regulations, the City has
6 refused, and continues to refuse, to include the premium pays in the regular rate of pay
7 that is used for determining the overtime rate of pay for FLSA eligible hours. As a result,
8 the overtime rate of pay that the City has paid, and continues to pay, is less than that to
9 which the Plaintiffs are entitled to by the FLSA.

10 13. The City's violations of the FLSA as alleged herein have been done in a
11 willful and bad faith manner in that the City received notice through a previous court action
12 that it must include holiday-in-lieu pay and other premium pays when calculating the FLSA
13 rate of pay. (*Sekany v. City of San Jose*, Case No. 98-21081 JW)

14 14. In addition, the City has failed, and continues to fail, to pay the correct FLSA
15 rate of pay to Plaintiffs when Plaintiffs perform overtime work usually assigned to 56-hour
16 (shift) employees. Pursuant to the FLSA regulations, the City must calculate the FLSA
17 overtime rate for Plaintiffs based on a 40-hour rate for all overtime hours worked, unless
18 the employer and the employees mutually agree in advance to pay at a different rate of
19 pay. No such agreement has been entered into by the City and the Plaintiffs. However, the
20 City has used, and continues to use, the lower 56-hour rate of pay when calculating FLSA
21 overtime for Plaintiffs who perform overtime shift work. As a result, the overtime rate of pay
22 that the City has paid, and continues to pay, for overtime shift work is less than that to
23 which the Plaintiffs are entitled to by the FLSA .

24 15. Furthermore, the City has used, and continues to use, a payroll accounting
25 system which undercounts the number of hours worked by Plaintiffs during a 14-day work
26 period, a practice which results in the underpayment of FLSA premium pay. As a result, the
27 overtime rate of pay that the City has paid, and continues to pay, is less than that to which
28 the Plaintiffs are entitled to by the FLSA. When a 40 hour employee works a 24 hour shift,

the City converts those shift hours to their "40 hour equivalent," and then pays the 40 hour rate of pay on the reduced number of hours. The City then improperly uses this reduced number of hours to determine whether Plaintiffs have worked sufficient hours to be eligible for the higher FLSA overtime rate of pay.

16. As a result of these willful violations of the FLSA, overtime compensation has
been unlawfully withheld by the City from Plaintiffs for which Defendant is liable pursuant to
29 U.S.C. section 216(b), together with an additional equal amount as liquidated damages,
interest, reasonable attorney fees and the costs of this action.

9 17. The employment and work records for each Plaintiff are in the exclusive
10 possession, custody and control of the City, and the Plaintiffs are unable to state at this
11 time the exact amount owing to each of them. The City is under a duty imposed by 29
12 U.S.C. section 211(c) and the regulations of the U.S. Department of Labor to maintain and
13 preserve payroll and other employment records with respect to Plaintiffs from which the
14 amounts of the City's liability can be ascertained.

15 18. Plaintiffs notified the City on August 14 that the City was in violation of the
16 FLSA as set forth above and demanded that the City cease its illegal pay practices. The
17 City requested an extension of time to respond and agreed that it would toll any further
18 running of the statute of limitations as of September 21, 2007 if the Plaintiffs would grant an
19 extension. The Plaintiffs granted three extension with each concomitant tolling agreement,
20 the final one expiring on November 23, 2007. As of the date of the filing of this action the
21 City still has not responded to the demand and has continued the practices in violation of
22 the FLSA.

PRAYER FOR RELIEF

24 WHEREFORE, the Plaintiffs, on their own behalf and on behalf of others similarly
25 situated, pray that this Court:

26 (1) Enter a declaratory judgment declaring that the City has willfully and
27 wrongfully violated its statutory and legal obligations, and deprived Plaintiffs

1 of their rights, protections and entitlements under federal law, as alleged
2 herein;

3 (2) Order a complete and accurate accounting of all compensation to which
4 Plaintiffs are entitled;

5 (3) Award each Plaintiff monetary damages in the form of back pay
6 compensation, and liquidated damages equal to their unpaid compensation,
7 plus pre-judgment interest and post-judgment interest;

8 (4) Award Plaintiffs their reasonable attorney's fees to be paid by the City, and
9 the costs of this action; and

10 (5) Grant such other relief as may be just and proper.

11 Dated: December 19, 2007

12 Respectfully submitted,

13 WYLIE, McBRIDE,
14 PLATTEN & RENNER

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16 CHRISTOPHER E. PLATTEN

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18 CAROL L. KOENIG
19 Attorneys for Plaintiffs

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